No. 79-764

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT I. FALK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 605 F. 2d 1005.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1979. A petition for rehearing was denied on October 17, 1979 (Pet. App. B). The petition for a writ of certiorari was filed on November 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the summation of the prosecutor deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of filing a false income tax return for 1973 by knowingly and willfully understating his gross income, in violation of 26 U.S.C. 7206(1). The district court sentenced him to one year in prison and fined him $5,000. However, the court suspended the sentence and placed petitioner on probation for two years on the condition that he pay any fraud penalties assessed by the Internal Revenue Service, in addition to the imposed fine (Pet. App. 1a). The court of appeals affirmed (Pet. App. 1a-20a).

The evidence adduced at trial showed that during 1969-1975, petitioner, a mechanical engineer, was employed by McKee-Berger-Mansueto Company (MBM), a Chicago based firm, as manager of its estimating department. In 1972, while employed by MBM, petitioner was engaged as a consultant by J.P. Phillips Co., a plastering contractor. During 1973, petitioner received two checks from Phillips for services rendered from August 1972 through 1973, in the amounts of $3,000 and $7,000. At petitioner's request, Phillips made both checks payable to the Beverly Bank. Shortly before he received the first check, petitioner reopened a dormant account in that bank in the name of Arm Industries, a partnership in which petitioner had previously been engaged. Petitioner executed new bank signature cards on which he signed his name and the name of his former partner, David Povilaitis. Petitioner thereafter deposited both checks in the Arm Industries account, drew checks on that account, and deposited the proceeds in his personal account. Petitioner failed to report either the $3,000 or the $7,000 payment as income on his 1973 tax return (Pet. App. 2a).

During an audit of Phillips in 1974, Internal Revenue Service Agent Friedman learned of the two checks payable by Phillips to Beverly Bank in payment for consulting fees to petitioner. Thereafter, the Service commenced a criminal investigation. Petitioner admitted to Agents Friedman and Starr that he had received the checks and failed to include them in his 1973 income (Pet. App. 3a).

The government presented its case through documents and the testimony of Agents Friedman, Starr, and Duffy, John P. Phillips, Phillip J. Phillips, David Povilaitis and an employee of Beverly Bank (Pet. App. 4a). In order to establish that petitioner acted willfully, the government relied in part upon petitioner's tax returns for 1969-1972 and 1974 to show his ability to comprehend unusual and complex tax matters. The returns showed that he had prepared special forms to accompany certain returns, had itemized deductions and had computed the tax consequences from the exchange of property and investment credits (Pet. App. 9a). The evidence also established that the J.P. Phillips Company had requested petitioner to send it receipts for the checks payable to Beverly Bank and that he had done so, initialing the receipts "H.I.B." (Pet. App. 3a). In addition, Agent Starr testified that petitioner stated that he did not report the income received from Phillips because he did not know how it should be reported; that he had received no W-2 Form or Form 1099; and that he was to be paid $8 per hour "tax free," later changed to $8 net after withholding (Pet. App. 3a-4a n.6). Starr further testified that petitioner stated, contrary to the testimony of John Phillips (Pet. App. 5a n.7), that the payment to the Beverly Bank was on John Phillips' "volition" and that he had not endorsed the checks because they were not payable to him (Pet. App. 4a n.6).

Petitioner testified that the payment of his commission checks to the Beverly Bank was devised to hide from MBM the fact that he was "moonlighting" for Phillips, a practice that he knew to be grounds for dismissal from the firm. He explained his failure to report the $10,000 in income in 1973 as due to confusion with respect to the proper method of reporting the funds and whether he was entitled to utilize income averaging (Tr. 166-167, 174-175; Pet. App. 4a-6a).

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim, renewed here (Pet. 10-14), that he is entitled to a new trial because in closing argument the prosecutor deliberately misstated the charges by twice referring to "tax evasion," rather than filing of false returns. But there is nothing in the record that supports the charge that the prosecutor's misstatements were intentional attempts to mislead or prejudice the jury. Moreover, in its instructions to the jury the court read the charge from the indictment, quoted from the statute, and instructed the jury that petitioner was on trial only for the offense charged. In addition, the court frequently advised the jury that the statements of the lawyers were not evidence (Pet. App. 11a). In these circumstances, the court of appeals properly ruled that the prosecutor's remarks were not unduly prejudicial (Pet. App. 11a). See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974); *Lisenba* v. *California*, 314 U.S. 219, 236 (1941); *United States* v. *Castenada*, 555 F. 2d 605 (7th Cir.), cert. denied, 434 U.S. 847 (1977).

2. The court of appeals also correctly rejected petitioners' claim that the prosecutors' final argument appealed to the pecuniary interests of the jury and was

therefore prejudicial error. The comments in question were as follows (Pet. 12-13):

> Okay,, if I may conclude, Judge, the fact is that if there are people who are not paying their fair share the rest of us have to make up—
>
> * * * * *
>
> There are millions of us every year who stay within the confines of the law. We report our income.

In concluding his rebuttal, the prosecutor commented (Pet. 13-14):

> I am not going to stand here and ask you to return a verdict of guilty against Mr. Falk because he subscribed to a false return, a false tax return, I am asking each of you to do what justice demands for ourselves and for other people in this district, who obey the law and claim their taxes.

In oral argument before the court of appeals, the government acknowledged the impropriety of these comments. But as that court correctly held (Pet. App. 12a-13a), these statements did not affect petitioner's substantial rights when viewed in the context of the entire argument and trial. The context of the entire argument, particularly the last sentence that "[w]e would ask for a verdict of guilty based upon the evidence" (Pet. 13) makes it apparent that the comments, while inappropriate, were not intended to, nor did they, prejudice the jury.

Finally, contrary to petitioner's claim (Pet. 9-10), the evidence of guilt was overwhelming. The only real issue related to petitioner's state of mind. Here, the record showed that petitioner was fairly sophisticated in his understanding of and ability to handle unusual and complex tax matters (see page 3, *supra*). The jury was amply justified in rejecting petitioner's defense that he was confused and did not know how to report the income. Indeed, the jury could infer from the evidence of petitioner's conduct and his contradictory explanations of his failure to report this income that he was attempting to conceal the Phillips income from the Internal Revenue Service and that he willfully filed a false tax return.[1] The concurring judge therefore properly concluded "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not swayed by the error" (Pet. App. 16a). *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). See also *United States* v. *Shepherd*, 576 F. 2d 719, 723-724 (7th Cir. 1978); *United States* v. *Castenada*, *supra*, 555 F. 2d at 610.

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[1]The concurring judge correctly observed that the prosecutor's reference to the fact that if some people do not pay their taxes others will have to make up the deficiency "amount[s] to no more than the assertion of what must be obvious to anyone upon a moment's thought" (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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